

IN THE MATTER OF
SHUPE-WILLIAMS CANDY COMPANY

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 20, 1914

Docket 2708. Complaint, Jan. 31, 1936—Decision, June 17, 1937

Where a corporation engaged in manufacture and sale of "straight" goods candy, and also of so-called "break and take," "draw," or "deal" assortments, sale and distribution of which type candy, in constant demand and affording, in connection with sale thereof to public, means or opportunity of obtaining a prize or becoming a winner by lot or chance, and providing an easy means of disposing of such products, teaches and encourages gambling among children, constituting substantial number of purchasers and consumers of such type, and sale and distribution of which in the markets of many manufacturers who sell their "straight" goods in interstate commerce in competition with the other, has been followed by a marked decrease in sales of such "straight" goods, due to gambling or lottery feature connected with said "break and take," "draw," or "deal" candy, preferred by consumers because of gambling feature connected therewith and sale of which candy, so packed and assembled as to enable retail dealers, without alteration, addition or rearrangement, to resell same to consuming public by lot or chance, is contrary to public policy—
Sold, to wholesalers, jobbers, and retailers, certain assortments of candy which were so packed and assembled as to involve, or were designed to or might involve, use of a lottery scheme when sold and distributed to consumers thereof, and several of which consisted of (a) a number of penny pieces of uniform size and shape, along with explanatory display cards for retailer's use, and number of larger pieces to be given to those purchasers procuring by chance one of aforesaid uniform pieces, concealed colored centers of which different from that of the majority, and small package of candy to be given as prize to purchaser of last piece in assortment, and (b) number of candy bars, together with push card for sale and distribution to purchasing public under a plan, and in accordance with said card's explanatory legend, by which person received, for five cents paid, one, two, three, four, or five bars of candy, dependent upon particular legend disclosed by chance by push, and purchaser of last push was entitled to six; so assembled and packed that they were designed to be, and were exposed and used by retailer dealer purchasers thereof for distribution and resale to purchasing public by lot or chance, without alteration or rearrangement and with knowledge and intent that such candy should thus be resold to public by lot or chance by said retail dealers, in competition with many who regard such sale and distribution as morally bad and as encouraging gambling, and especially among children, and as injurious to the candy industry through resulting in the merchandising of a chance or lottery instead of candy, and as providing retail merchants with a means of violating the laws of the several States, and some of whom, for such reasons, refuse to sell candy so packed and assembled that it can be resold to public by lot or chance;

With result that such competitors were put to a disadvantage in competing, retailers, finding candy more salable by "break and take," "draw," or "deal" method, bought from it and others employing same methods of sale, trade was diverted to it and others using similar method from said competitors, who could compete on even terms only by giving similar devices to retailers, and sales of their "straight" candy, in their unwillingness so to do, showed a marked decrease, some competitors began sale and distribution of candy by lot or chance in order to meet competition of manufacturers who thus sold and distributed such products, and trade was diverted to it from its said competitors, and there was a restraint upon, and a detriment to the freedom of fair and legitimate competition in the industry involved; to the prejudice and injury of the public and competitors:

Held, That such acts and practices, under the conditions and circumstances set forth, were all to the prejudice of the public and competitors and constituted unfair methods of competition.

Before *Mr. Charles P. Vicini* and *Mr. Henry M. White*, trial examiners.

Mr. P. C. Kolinski and *Mr. Henry C. Lank* for the Commission.

COMPLAINT

Pursuant to the provisions of an Act of Congress approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," the Federal Trade Commission, having reason to believe that Shupe-Williams Candy Company, a corporation, hereinafter referred to as respondent, has been and is using unfair methods of competition in commerce, as "commerce" is defined in said act of Congress, and it appearing to said Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent is a corporation, organized under the laws of Utah with its principal office and place of business in the city of Ogden, State of Utah. Respondent is now, and for several years last past, has been engaged in the manufacture of candy and in the sale and distribution thereof to wholesale and retail dealers located at points in the various States of the United States, and causes said products, when so sold, to be transported from its place of business in the city of Ogden, State of Utah, to purchasers thereof in other States of the United States at their respective places of business, and there is now, and has been for several years last past, a course of trade and commerce by said respondent in such candy, between and among the States of the United States. In the course and conduct of the said business, respondent is in competition with other corporations and with individuals and partnerships engaged

in the sale and distribution of candy and candy products in commerce between and among the various States of the United States.

PAR. 2. In the course and conduct of its business, as described in paragraph 1 hereof, respondent sells and has sold to wholesale and retail dealers, various packages or assortments of candy, so packed and assembled as to involve the use of a lottery scheme when sold and distributed to the consumers thereof. Certain of said packages are hereinafter described for the purpose of showing the methods used by respondent, but this list is not all inclusive of the various packages, nor does it include all the details of the several sales plans which respondent has been or is using in the distribution of candy by lot or chance:

(a) One of said assortments is composed of a number of pieces of candy of uniform size, shape, and quality, together with a number of larger pieces of candy and a small box of candy, which larger pieces of candy and small box of candy are to be given as prizes to purchasers of said pieces of candy of uniform size, shape, and quality, in the following manner:

The majority of the said pieces of candy of uniform size, shape, and quality, have centers of the same color, but a small number of said pieces of candy have centers of a different color. The said pieces of candy of uniform size, shape and quality, retail at the price of one cent each, but the purchaser who procures one of the said candies having a center of a different color than the majority, is entitled to receive, and is to be given free of charge, one of the said larger pieces of candy heretofore referred to. The purchaser of the last piece of candy in said assortment is entitled to receive, and is to be given free of charge, the small box of candy. The color of the center of said pieces of candy is effectively concealed from purchasers and prospective purchasers until a selection has been made and the piece of candy broken open. The aforesaid purchasers of said candy having a center colored differently from the majority thus procure one of the said larger pieces of candy wholly by lot or chance, and the purchaser of the last piece of candy in the said assortment thus procures the small box of candy wholly by lot or chance.

The respondent furnishes to said wholesale and retail dealers, with said assortment, a display card to be used by the retail dealer in offering said candy to the public. The display card bears a legend or statement informing the prospective purchaser that the said candy is being sold in accordance with the above described sales plan.

(b) Another assortment manufactured and distributed by respondent is composed of a number of candy bars, together with a device commonly called a push card. Candy contained in said assortment is distributed to purchasers in the following manner:

The push card has a number of partially perforated discs, and when a push is made and the disc separated from the card, a legend is disclosed. Sales are 5¢ each and the card bears statements informing customers and prospective

Complaint

customers that certain specified legends entitle customer to one bar of candy, that certain other specified legends entitle the customer to two bars of candy, that certain other specified legends entitle the customer to three bars, that certain other specified legends entitle the customer to four bars of candy, and that other specified legends entitle the customer to five bars of candy. The legends on the discs or pushes are effectively concealed from the purchaser and prospective purchaser until a selection has been made and the disc separated from the card. The number of bars of candy which a customer receives for the price of 5¢ is thus determined wholly by lot or chance.

PAR 3. The wholesale dealers to whom respondent sells its assortments, resell said assortments to retail dealers, and said retail dealers, and the retail dealers to whom respondent sells direct, expose said assortments for sale, and sell said candy to the purchasing public in accordance with the aforesaid sales plans. Respondent thus supplies to and places in the hands of others the means of conducting lotteries in the sale of its products in accordance with the sales plans hereinabove set forth, as a means of inducing purchasers thereof to purchase respondent's said products in preference to candy offered for sale and sold by its competitors.

PAR. 4. The sale of said candy to the purchasing public in the manner above alleged involves a game of chance or the sale of a chance to procure (a) larger pieces of candy or a small box of candy; (b) additional bars of candy.

The use by respondent of said method of the sale of candies, and the sale of candies by and through the use thereof and by the aid of said method is a practice of the sort which the common law and criminal statutes have long deemed contrary to public policy; and is contrary to an established public policy of the Government of the United States. The use by respondent of said method has the dangerous tendency unduly to hinder competition or create monopoly in this, to wit: that the use thereof has the tendency and capacity to exclude from the branch of the candy trade involved in this proceeding competitors who do not adopt and use the same method or an equivalent or similar method involving the same or an equivalent or similar element of chance or lottery scheme.

Wherefore, many persons, firms, and corporations who make and sell candy in competition with the respondent, as above alleged, are unwilling to offer for sale or sell candy so packed and assembled as above alleged, or otherwise arranged and packed for sale to the purchasing public so as to involve a game of chance, and such competitors refrain therefrom.

PAR. 5. Many dealers in and ultimate purchasers of candy are attracted by respondent's said method and manner of packing said candy, and by the element of chance involved in the sale thereof in

Findings

25 F. T. C.

the manner above described, and are thereby induced to purchase said candy so packed and sold by respondent, in preference to candy offered for sale and sold by said competitors of respondent who do not use the same or equivalent methods. The use of said method by respondent has the tendency and capacity, because of said game of chance, to divert to respondent trade and custom from its said competitors who do not use the same or an equivalent method; to exclude from said candy trade all competitors who are unwilling to and who do not use the same or an equivalent method because the same is unlawful; to lessen competition in said candy trade, and to tend to create a monopoly of said candy trade in respondent and such other distributors of candy as use the same or an equivalent method, and to deprive the purchasing public of the benefit of free competition in said candy trade. The use of said method by the respondent has the tendency and capacity to eliminate from said candy trade all actual competitors, and to exclude therefrom all potential competitors, who do not adopt and use said method or an equivalent method.

PAR. 6. Many of said competitors of respondent are unwilling to adopt and use said method or any method involving a game of chance or the sale of a chance to win something by chance or any other method that is contrary to public policy.

PAR. 7. The aforementioned methods, acts, and practices of the respondent are all to the prejudice of the public and of respondent's competitors as hereinabove alleged. Said methods, acts and practices constitute unfair methods of competition in commerce within the intent and meaning of Section 5 of an Act of Congress, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of an Act of Congress, approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," the Federal Trade Commission, on January 31, 1936, issued and served a complaint upon the respondent, Shupe-Williams Candy Company, a corporation, charging that respondent had been and was using unfair methods of competition in commerce, as "commerce" is defined in said act of Congress.

After the issuance of said complaint and the filing of respondent's answer thereto, testimony and other evidence in support of the allegations of the complaint were introduced by P. C. Kolinski, attorney

for the Commission, and in opposition to the allegations of the complaint by D. B. Van Dyke and H. L. Mulliner, attorneys for the respondent, before Charles P. Vicini and Henry M. White, examiners of the Commission theretofore duly designated by it, and said testimony and other evidence were duly recorded and filed in the office of the Commission.

Thereafter, the proceeding regularly came on for final hearing before the Commission on said complaint, the answer thereto, testimony and other evidence, briefs in support of the complaint and in opposition thereto, and the oral argument of Henry C. Lank, counsel for the Commission, the respondent not being represented although duly notified of the time and place of such hearing; and the Commission, having duly considered the same and being fully advised in the premises, finds that this proceeding is in the interest of the public and makes this its findings as to the facts and its conclusion drawn therefrom:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent, Shupe-Williams Candy Company, is a corporation organized under the laws of the State of Utah, with its principal office and place of business located at 2605 Wall Avenue, in the city of Ogden, State of Utah. Respondent is now, and for several years last past has been, engaged in the manufacture of candy in the city of Ogden and in the sale and distribution thereof to retail dealers and jobbers located in the State of Utah and in the States of Idaho, Nevada, Wyoming, Montana, Colorado, and Oregon. It causes said candy when sold to be shipped or transported from its principal place of business in the State of Utah to purchasers thereof in Utah and in the other States of the United States as mentioned above. In so carrying on said business, respondent is and has been engaged in interstate commerce, and is and has been engaged in active competition with other corporations and with partnerships and individuals engaged in the manufacture of candy and in the sale and distribution thereof in commerce between and among the various States of the United States.

PAR. 2. In the course and conduct of its business, as described in paragraph 1 hereof, respondent sells and has sold to wholesale dealers, jobbers, and retail dealers certain assortments of candy so packed and assembled as to involve, or which are designed to or may involve, the use of a lottery scheme when sold and distributed to the consumers thereof.

Several of such assortments manufactured, sold and distributed by respondent are composed of a number of pieces of candy of uni-

Findings

25 F. T. C.

form size and shape, together with a number of larger pieces of candy and a small package of candy, which larger pieces of candy and small package of candy are to be given as prizes to purchasers of said pieces of candy of uniform size and shape in the following manner: The majority of the said pieces of candy of uniform size and shape have centers of the same color, but a small number of said pieces of candy have centers of a different color. The said pieces of candy of uniform size and shape retail at the price of 1¢ each, but the purchaser who procures one of the said candies having a center of a different color from the majority is entitled to receive and is to be given free of charge one of the said larger pieces of candy in said assortment. The purchaser of the last piece of candy in said assortment is entitled to receive and is to be given free of charge the small package of candy contained in said assortment. The color of the center of said pieces of candy is effectively concealed from purchasers and prospective purchasers until a selection has been made and the piece of candy selected broken open. The purchasers of said candies having a center colored differently from the majority thus procure one of the said larger pieces of candy or the small package of candy wholly by lot or chance. The respondent furnishes to said wholesale and retail dealers with said assortments a display card to be used by retail dealers in offering said candy to the public. The display card bears a legend or statement informing purchasers and prospective purchasers that the said candy is being sold in accordance with the above described sales plan.

Respondent has also distributed and does distribute assortments of candy which are composed of a number of bars of candy, together with a device commonly called a "push card". The said bars of candy are distributed to the consuming public by means of said pushcard in the following manner: The pushcard has a number of partially perforated discs, and when a push is made and the disc separated from the card a legend is disclosed. Sales are 5¢ each, and the card bears statements informing customers and prospective customers that certain specified legends entitle the customer to one bar of candy; that certain other specified legends entitle the customer to two bars of candy; others to three bars of candy; others to four bars of candy; others to five bars of candy; and that the purchaser of the last push is entitled to six bars of candy. The legends on the discs or pushes are effectively concealed from purchasers and prospective purchasers until a selection has been made and the particular disc selected separated from the card. The fact as to whether a purchaser receives one, two, three, four, five, or six

bars of candy for the price of 5¢ is thus determined wholly by lot or chance.

PAR. 3. The candy assortments involving the lot or chance feature, as above described, are generally referred to in the candy trade or industry as "break and take," "draw," or "deal" assortments. Assortments of candy without the lot or chance features in connection with their resale to the public are generally referred to in the candy trade or industry as "straight" goods. These terms will be used hereafter in these findings to distinguish these separate types of assortments.

PAR. 4. The wholesale dealers or jobbers to whom respondent sells its assortments resell the same to retail dealers. Respondent also sells its said assortments direct to retail dealers. Numerous retail dealers purchase the assortments described in paragraph 2 above either from respondent or from wholesale dealers or jobbers who in turn have purchased said assortments from respondent, and such retail dealers display said assortments for sale to the public as packed by respondent, and the candy contained in said assortments is generally sold and distributed to the consuming public in accordance with respondents' sales plans, as above described.

PAR. 5. All sales made by respondent, whether to wholesalers and jobbers or to retail dealers, are absolute sales and respondent retains no control over said assortments after they are delivered to the wholesale dealer or jobber or retail dealer. The assortments are assembled and packed in such manner that they are designed to be used and are used by the retail dealer for distribution to the purchasing public by lot or chance without alteration or rearrangement. In the sale and distribution to jobbers and wholesale dealers for resale to retail dealers and to retail dealers direct of the assortments of candy described in paragraph 2, respondent has knowledge that said candy will be resold to the purchasing public by retail dealers by lot or chance, and it packs such candy in the way and manner described so that without alteration, addition or rearrangement thereof it may be resold to the public by lot or chance by said retail dealers.

PAR. 6. There are in the United States and in the territory served by this respondent many manufacturers of candy who do not manufacture and sell "break and take," "draw," or "deal" assortments of candy and who sell their "straight" goods in interstate commerce in competition with the "break and take," "draw," or "deal" candy, and manufacturers of "straight" goods have noted a marked decrease in the sales of their products whenever or wherever the "break and take,"

"draw," or "deal" assortments have appeared in their markets. This decrease in the sale of "straight" candy is due to the gambling or lottery feature connected with the "break and take," "draw," or "deal" candy. Witnesses from several branches of the candy industry testified in this proceeding to the effect that consumers preferred to purchase the "break and take," "draw," or "deal" candy because of the gambling feature connected with its sale. The sale and distribution of "break and take," "draw," or "deal" packages or assortments of candy, or of candy which has connected with its sale to the public the means or opportunity of obtaining a prize or becoming a winner by lot or chance, teaches and encourages gambling among children, who comprise a substantial number of the purchasers and consumers of this type of candy.

PAR. 7. The sale and distribution of candy by the retailers by the methods described herein is the sale and distribution of candy by lot or chance and constitutes a lottery or gaming device. The Commission finds that many competitors regard such sale and distribution as morally bad and as encouraging gambling, especially among children; as injurious to the candy industry because it results in the merchandising of a chance or lottery instead of candy; and as providing retail merchants with a means of violating the laws of the several States. Because of these reasons some competitors of respondent refuse to sell candy so packed and assembled that it can be resold to the public by lot or chance. These competitors are thereby put to a disadvantage in competing. The retailers, finding that they can dispose of more candy by the "break and take," "draw," or "deal" method, buy from respondent and others employing the same methods of sale, and thereby trade is diverted to respondent and others using similar methods from said competitors. Such competitors can compete on even terms only by giving the same or similar devices to retailers. This they are unwilling to do, and their sales of "straight" candy show a marked decrease. The sale and distribution of candy by lot or chance provides an easy means of disposing of such products. There is a constant demand for candy which is sold by lot or chance, and in order to meet the competition of manufacturers who sell and distribute candy which is sold by such methods, some competitors have begun the sale and distribution of candy to the public by lot or chance. The use of such methods by respondent, in the sale and distribution of its candy, is prejudicial and injurious to the public and its competitors, and has resulted in the diversion of trade to respondent from its said competitors, and is a restraint upon and a detriment to the freedom of fair and legitimate competition in the candy industry.

170

Order

PAR. 8. Respondent sells its merchandise in the States of Utah, Idaho, Nevada, Wyoming, Montana, Colorado, and Oregon. The majority of its candy is sold as "straight" merchandise, but its sales of "break and take," "draw," or "deal" assortments are substantial.

PAR. 9. The Commission further finds that the sale and distribution in interstate commerce of assortments or packages of candy so packed and assembled as to enable retail dealers, without alteration, addition or rearrangement, to resell the same to the consuming public by lot or chance, is contrary to public policy.

CONCLUSION

The aforesaid acts and practices of respondent, Shupe-Williams Candy Company, a corporation, under the conditions and circumstances set forth in the foregoing findings of fact, are all to the prejudice of the public and respondents' competitors, and constitute unfair methods of competition in commerce, within the intent and meaning of Section 5 of an Act of Congress, approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes."

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, the answer of respondent, testimony and other evidence taken before Charles P. Vicini and Henry M. White, examiners of the Commission theretofore duly designated by it, in support of the allegations of said complaint and in opposition thereto, briefs filed herein, and the oral argument of Henry C. Lank, counsel for the Commission, the respondent not being represented at said argument although duly notified of the time and place thereof; and the Commission having made its findings as to the facts and its conclusion that said respondent has violated the provisions of an Act of Congress, approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes."

It is hereby ordered, That the respondent, Shupe-Williams Candy Company, a corporation, its officers, agents, representatives, and employees, in the offering for sale, sale and distribution in interstate commerce of candy, do cease and desist from:

1. Selling and distributing to wholesale dealers and jobbers, for resale to retail dealers and to retail dealers direct, candy so packed and assembled that sales of said candy to the general public are to

be made, or may be made, by means of a lottery, gaming device, or gift enterprise.

2. Supplying to or placing in the hands of retail and wholesale dealers and jobbers assortments of candy which are used, or may be used, without alteration or rearrangement of the contents of such assortments, to conduct a lottery, gaming device, or gift enterprise in the sale or distribution of the candy contained in said assortments to the public.

3. Packing or assembling in the same assortment of candy for sale to the public at retail pieces of candy of uniform size and shape having centers of a different color, together with larger pieces of candy and a small package of candy, which said larger pieces of candy and small package of candy are to be given as prizes to the purchaser procuring a piece of candy with a center of a particular color.

4. Supplying to or placing in the hands of retail and wholesale dealers and jobbers assortments of candy, together with a device commonly called a "push card," for use, or which may be used, in distributing or selling said candy to the public at retail.

5. Furnishing to retail and wholesale dealers and jobbers a device commonly called a "push card," either with assortments of candy or separately, bearing a legend or legends or statements informing the purchasing public that the candy is being sold to the public by lot or chance, or in accordance with a sales plan which constitutes a lottery, gaming device, or gift enterprise.

It is further ordered, That the respondent, Shupe-Williams Candy Company, a corporation, shall, within 30 days after service upon it of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with the order to cease and desist hereinabove set forth.

Syllabus

IN THE MATTER OF
OSTLER CANDY COMPANYCOMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 2837. Complaint, June 8, 1936—Decision, June 17, 1937*

Where a corporation engaged in manufacture and sale of "straight" or "staple" goods candy, and also of so-called "break and take," "draw," or "deal" assortments, sale and distribution of which type candy, in constant demand and affording, in connection with sale thereof to public, means or opportunity of obtaining a prize or becoming a winner by lot or chance, and providing an easy means of disposing of such products, teaches, and encourages gambling among children, constituting substantial number of purchasers and consumers of such type, and sale and distribution of which in the markets of many manufacturers who sell their "straight" goods in interstate commerce in competition with the other, has been followed by a marked decrease in sales of such "straight" goods, due to gambling or lottery feature connected with said "break and take," "draw," or "deal" candy, preferred by consumers because of gambling feature connected therewith, and sale of which candy, so packed and assembled as to enable retail dealers, without alteration, addition or rearrangement, to resell same to consuming public by lot or chance, is contrary to public policy—

Sold, to jobbers and retailers, certain assortments of candy which were so packed and assembled as to involve, or which were designed to involve, use of a lottery scheme when sold and distributed to consumers thereof, and several of which consisted of (a) a number of candy bars, together with a push card, for sale and distribution to purchasing public under a plan, and in accordance with said card's explanatory legend, by which person received, for five cents paid, one or more additional bars of candy, depending on numbers or legends pushed by chance, and last push on card likewise received specified number of additional bars, and of other assortments involving same principal or sales plan where unit of sale was one cent rather than five cents, and varying in detail from that immediately above described in such matters as inclusion of additional pieces of candy to be given as prizes or in the furnishing of articles of merchandise other than candy to be thus given and distributed to ultimate consumers wholly by lot or chance, and (b) assortments of a number of penny pieces of candy of uniform size and shape, together with number of larger pieces to be given as prizes to purchasers of a relatively few of said uniform pieces, concealed color or colored centers of which differed from that of the majority, and also with small box of candy to be given free of charge to purchaser of last piece of uniform size in assortment; so assembled and packed that they were designed to be, and were, exposed and used by retail dealer purchasers for distribution and resale to purchasing public by lot or chance, without alteration or rearrangement, and with knowledge and intent that such candy should thus be resold to public by lot or chance by said retail dealers, in competition with many who regard such sale and distribution as morally bad and as encouraging gambling, and espe-